

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed	)	RM-10586
and Mobile Broadband Access, Educational and Other)	
Advanced Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	
Part 1 of the Commission's Rules - Further Competitive	)	WT Docket No. 03-67
Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable Multipoint	)	MM Docket No. 97-217
Distribution Service and the Instructional Television)	
Fixed Service to Engage in Fixed Two-Way)	
Transmissions)	
)	
Amendment of Parts 21 and 74 of the Commission's Rules	)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution	)	RM-9718
Service and in the Instructional Television Fixed Service)	
for the Gulf of Mexico)	
)	

**JOINT COMMENTS OF
THE CATHOLIC TELEVISION NETWORK
AND THE NATIONAL ITFS ASSOCIATION**

Edwin N. Lavergne
Fish & Richardson P.C.
1425 K Street, N.W.
Suite 1100
Washington, DC 20005
202-626-6359

Todd D. Gray
Dow Lohnes & Albertson, pllc
1200 New Hampshire Ave., N.W., Suite
800
Washington, DC 20036-6802
202) 776-2571

Counsel for the Catholic Television
Network

Counsel for the National ITFS Association

September 8, 2003

TABLE OF CONTENTS

I.	INTRODUCTION	2
II.	FREE MARKET FORCES ALONE SHOULD NOT DICTATE WHO CONTROLS ITFS SPECTRUM	3
III.	INCREASED LEASED USE OF ITFS EXCESS CAPACITY BY COMMERCIAL ENTITIES DOES NOT JUSTIFY CHANGING ITFS ELIGIBILITY RESTRICTIONS	8
IV.	THE AVAILABILITY OF OTHER SOURCES OF PROGRAMMING DOES NOT JUSTIFY CHANGING ITFS ELIGIBILITY RESTRICTIONS	12
V.	THE COMMISSION’S EXISTING ITFS LEASING RULES PROVIDE SIGNIFICANT FLEXIBILITY TO ALLOW COMMERCIAL LESSEES TO DEPLOY A WIDE VARIETY OF ADVANCED SERVICES IN THE 2.5 GHZ BAND	14
VI.	OTHER ITFS ELIGIBILITY AND SERVICE ISSUES	15
VII.	CONCLUSION	17

SUMMARY

The Catholic Television Network (“CTN”) and the National ITFS Association (“NIA”) represent the interests of the majority of Instructional Television Fixed Service (“ITFS”) licensees in the United States. CTN and NIA are greatly troubled by proposals in the Notice of Proposed Rulemaking (“NPRM”) that could result in sweeping changes to ITFS eligibility and educational use requirements, including the possibility of permitting commercial entities to become licensed on ITFS channels. CTN and NIA are strongly opposed to any rule changes that would permit commercial licensing on ITFS channels.

Permitting market forces to dictate who controls ITFS spectrum would, over time, result in a de facto reallocation of this valuable spectrum resource. This would not be in the public interest because spectrum assets that are controlled by educators empower them to use such assets in ways that best meet their changing needs. The Commission has recognized the importance of spectrum set-asides in other contexts, and the ITFS educational set-aside should be preserved as well.

Contrary to suggestions in the NPRM, increased leasing of ITFS capacity to commercial entities does not justify changing ITFS eligibility restrictions. Such leasing has been encouraged by the Commission for nearly two decades, and is fully consistent with the Commission’s forward-looking policy goals in its “secondary markets” proceeding. Also, new technologies and digitization are increasingly making leasing even more feasible and creating opportunities for greater and more efficient use of ITFS spectrum. Significantly, existing lease agreements are structured to provide significant flexibility to commercial lessees to build and modify commercial systems as they see fit.

Contrary to suggestions in the NPRM, the availability of other sources of programming (for example, through the Internet) does not justify changing ITFS eligibility restrictions. The primary benefit of ITFS over other means of program delivery is that ITFS enables educators to decide for *themselves* how to use spectrum to meet their changing needs. While the use of ITFS spectrum will change over time, it is the ongoing *control* over the spectrum asset that is important to ITFS licensees.

Finally, it is clear that data services meet ITFS educational use requirements. Moreover, CTN and NIA support the Commission's proposal to relieve ITFS licensees of the requirement that they file every ITFS lease agreement with the Commission.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the	)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of Fixed	)	RM-10586
and Mobile Broadband Access, Educational and Other)	
Advanced Services in the 2150-2162 and 2500-2690)	
MHz Bands)	
)	
Part 1 of the Commission's Rules - Further Competitive	)	WT Docket No. 03-67
Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable Multipoint	)	MM Docket No. 97-217
Distribution Service and the Instructional Television)	
Fixed Service Amendment of Parts 21 and 74 to Engage)	
in Fixed Two-Way Transmissions)	
)	
Amendment of Parts 21 and 74 of the Commission's Rules	)	WT Docket No. 02-68
With Regard to Licensing in the Multipoint Distribution	)	RM-9718
Service and in the Instructional Television Fixed Service)	
for the Gulf of Mexico)	
)	

**JOINT COMMENTS OF
THE CATHOLIC TELEVISION NETWORK
AND THE NATIONAL ITFS ASSOCIATION**

The Catholic Television Network ("CTN") and the National ITFS Association ("NIA"), by their attorneys, hereby submit these joint comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above captioned matter.¹ These comments focus solely on proposals in the NPRM concerning ITFS eligibility, educational use requirements, and excess capacity leasing rules.

¹ *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-*

I. INTRODUCTION

CTN is an association of Roman Catholic archdioceses and dioceses that operate many of the largest parochial school systems in the United States. CTN's members use Instructional Television Fixed Service ("ITFS") frequencies to distribute educational, instructional, inspirational, and other services to schools, colleges, parishes, community centers, hospitals, nursing homes, residences, and other locations. Collectively, CTN's members serve over 600,000 students and 4,000,000 households throughout America. NIA, established in 1978, is a non-profit, professional organization of ITFS licensees, applicants and others interested in ITFS. The goals of the NIA are to gather and exchange information about ITFS, to act as a conduit for those seeking information or assistance about ITFS, and to represent the interests of ITFS licensees and applicants.

In the NPRM, the Commission solicits comment on what is referred to as the "Coalition Proposal," a white paper submitted on October 7, 2002, by the Wireless Communications Association International, Inc. ("WCA"), CTN, and NIA. In addition, the NPRM seeks comment on alternatives to the Coalition Proposal. In separate comments filed with the Commission today, the WCA, NIA, and CTN jointly address a broad spectrum of issues raised in the NPRM. However, these comments are being filed separately by CTN and NIA to address issues involving ITFS eligibility and educational use requirements, which are of unique importance to ITFS licensees and the educational community.

Specifically, CTN and NIA are concerned with proposals in the NPRM that could result in sweeping changes to ITFS eligibility and educational use requirements,

2690 MHz Bands, Notice of Proposed Rulemaking and Memorandum Opinion and Order, FCC 03-56 (rel. April 2, 2003) 18 FCC Rcd 6722 (2003).

including the possibility of permitting commercial entities to become licensed on ITFS channels.² According to the NPRM, these proposals stem from the Commission's general policy goal of eliminating spectrum use restrictions except in circumstances where there are clear and compelling reasons for retaining such restrictions. They also stem from the Commission's desire to permit market forces to push radio spectrum to its highest and best use.³

As discussed below, there are clear and compelling reasons not to permit market forces alone to dictate the control and use of ITFS spectrum. Neither the Commission's ITFS leasing policies nor the availability of other sources of programming justify elimination or modification of the existing ITFS eligibility restrictions. Indeed, contrary to suggestions otherwise in the NPRM, the Commission's leasing policies provide not only important benefits to ITFS licensees, they also offer significant flexibility to commercial entities to deploy advanced fixed and mobile services in the band.

II. FREE MARKET FORCES ALONE SHOULD NOT DICTATE WHO CONTROLS ITFS SPECTRUM.

As a general proposition, CTN and NIA can appreciate the Commission's desire to allow free market forces to drive spectrum to its highest and best use. However, market forces do not always achieve this goal. Thus, there are clear and compelling reasons not to treat ITFS like other services where eligibility and use restrictions have been eliminated. ITFS is the only spectrum specifically set aside by the Commission for control by educators and required to be used to provide service in support of educational

² See NPRM at ¶¶ 107-129.

³ See NPRM at ¶ 111.

efforts. As a result, the spectrum is used to provide a variety of important services that would otherwise not be available to the public.

In ET Docket No. 00-258, the Commission was provided with extensive information concerning how ITFS licensees use their assigned spectrum for educational and instructional purposes.⁴ Similarly, in comments filed by ITFS licensees in this proceeding, the Commission will be provided with additional information concerning educational use of this spectrum. To summarize, ITFS stations have traditionally been used to deliver point to multi-point educational video and audio programming. Contrary to myths perpetrated by parties who would like to see the 2.5 GHz band taken for other purposes, ITFS licensees' record of stewardship in the use of their frequencies is strong.

ITFS usage for traditional video instruction has been widespread and effective. ITFS has provided a critical "last mile" distribution channel for a wide variety of valuable services, including the provision of formal telecourses (on the K-12, secondary and post-secondary levels) to schools, hospitals, workplaces and other places of learning; transmission of other educationally valuable programming into schools (such as news, public affairs, history and similar material); provision of professional and worker training (often for teachers, health professionals and public safety officers); transmission of teleconferences for educational and training purposes; and transmission of other administrative communications by schools. Generally, the transmissions are received directly at the intended educational sites. However, ITFS stations also transmit educational programming to cable television headends, making it possible for cable

⁴ Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, ET Docket No. 00-258, *First Report and Order and Memorandum Opinion and Order*, 16 FCC Rcd 17222 (2001).

systems to transmit the programming both to additional institutional sites and to subscribers' homes.

More recently, and looking to the future, ITFS stations have been and will continue to provide effective access to interactive digital instruction. CTN and NIA believe that ITFS stations provide one of this country's best options for enabling students to connect to invaluable educational material at broadband speeds. These services would not be available to the public if commercial interests controlled ITFS spectrum. Thus, the Commission cannot always rely on the marketplace and advertiser/subscriber-supported programming to meet important needs of society.

The ITFS community is convinced that permitting market forces to dictate who controls the spectrum would, over time, result in a de facto reallocation of this valuable spectrum resource from educational to commercial interests. This would not be in the public interest. Spectrum assets that are licensed to, managed, and controlled by educators themselves empower them to use such assets in ways that best meet their changing needs. The technology needs of education should not be driven exclusively by what the market will bear in the hope that commercial interests will "do the right thing." In the words of one educational reformer: For a commercial company, "the bottom line always comes first ... and in public schools, children must come first."⁵

Significantly, the Commission consistently has recognized the unique value of public interest spectrum set-asides in other contexts. For example, since the creation of the broadcast television table of allotments in 1952, where the FCC reserved 242

⁵ Interview with Ted Sizer, former Dean, Harvard Graduate School of Education, by Diana Henriques and John Merrow for the PBS *Frontline* documentary, "Public Schools, Inc." (aired June, 2003).

channels for what has become public television use,⁶ it has resisted any incursion into that reservation. Even in 2002, when the Commission approved the sale of noncommercial Channel 16 at Pittsburgh, Pennsylvania (WQEX-TV), it did so reluctantly and only at the request of the licensee who “demonstrated that it will better serve the Pittsburgh community if it is one strong NCE station with sufficient financial resources to construct digital facilities and produce educational programming that it would be if it continues to have two under-funded and struggling stations.”⁷ In a joint statement issued with the order, Chairman Powell and Commissioners Abernathy and Martin emphasized that “removing the reservation of a channel for noncommercial education (NCE) is not a step the Commission should ever take lightly.”⁸ Commissioner Copps dissented, arguing that the noncommercial licensee had not made a showing sufficient “to justify the extraordinary action of dereserving” the station.⁹

The Commission has even resisted perceived *qualitative* incursions into the public TV set-aside that might result from substituting UHF for VHF reserved channels. In 1986, the Commission adopted strict guidelines limiting the conditions under which commercial and non-commercial stations could exchange UHF and VHF television channels. In providing for channel exchanges, the Commission stated, “In no

⁶ *Sixth Report and Order* in Docket Nos. 8736 *et al.*, 41 FCC 148 (1952).

⁷ *In the Matter of Amendment of the Television Table of Allotments to Delete Noncommercial Reservation on Channel 16, 482-488 MHz, Pittsburgh, Pennsylvania*, (MM Docket No. 01-276), 17 FCC Rcd 14038 at 14052 (2002).

⁸ *Id.* at 14059.

⁹ *Id.* at 14061.

circumstance will educational reservations be eliminated through this process.”¹⁰ Similarly, in 1987, Congress appropriated funds for the Commission expressly on the condition that “none of the funds appropriated by this Act may be used to diminish the number of VHF channel assignments reserved for noncommercial educational television stations in the Television Table of Assignments.”¹¹

The ITFS educational set-aside should likewise be preserved. If the Commission allows this educational reserve to diminish, even by default, it will diminish the voice of education in future technology planning and services. With the reservation, educators have a place “at the table” where new technologies are considered and can help decide how such technologies can be used in the 2.5 GHz band to advance the interests of education. If educators are “bought out,” their control over this spectrum asset will be greatly compromised or diminished entirely. This concern is well-founded. In the words of a *New York Times* op-ed piece looking back on New York’s decision a few years ago to keep WNYC as a public-broadcast, non-commercial station:

Once public and quasi-public assets slip out of public control, it is almost impossible to retrieve or replace them. While privatizing any one might seem reasonable in the face of problems, the cumulative effect is to destroy a web of institutions that helped keep New York City livable and attractive during decades when many cities drastically declined. In good times, public services and safety nets do not seem so important. In bad times, it is too late to get them back.¹²

Admittedly, the sale of ITFS spectrum by an educational institution to a commercial entity might be beneficial to that individual ITFS licensee (*i.e.*, the sale of

¹⁰ *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, Report and Order (MM Docket No. 85-41), 59 Rad. Reg. 2d 1455 at paragraph 23.

¹¹ Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub.L. No. 100-202 (signed December 22, 1987).

¹² *New York Times*, Op-Ed by Joshua B. Freeman, June 3, 2000 (emphasis added).

ITFS spectrum by an individual institution for many millions of dollars might be quite beneficial to that particular institution). However, cumulatively, such sales would not be beneficial to education or society as a whole because, CTN and NIA fear, they would eventually result in the complete (or near complete) removal of this valuable spectrum asset from the hands of educators.

CTN and NIA recommend that if an individual ITFS licensee determines that it no longer has a continuing need or use for an ITFS license, the licensee should elect one of two options now available under the FCC's rules and policies: (1) assign the license to another entity eligible to hold an ITFS license, or (2) return the license to the FCC so that the spectrum can be used by another entity eligible to hold an ITFS license.

III. INCREASED LEASED USE OF ITFS EXCESS CAPACITY BY COMMERCIAL ENTITIES DOES NOT JUSTIFY CHANGING ITFS ELIGIBILITY RESTRICTIONS.

At paragraph 112 of the NPRM, the Commission points to the increased use of ITFS spectrum by commercial entities on an excess capacity lease basis as warranting revisiting whether ITFS eligibility restrictions continue to be necessary. As discussed below, there are numerous reasons why the use of ITFS spectrum by commercial entities does not justify changing ITFS eligibility requirements.

First, the Commission itself has encouraged ITFS licensees to lease spectrum to commercial entities. This encouragement started in 1983, and has consistently been reinforced since that time.¹³ For example, just three years ago the Commission stated:

We do not believe that there is any contradiction between an ITFS licensee performing its educational mission and that same licensee securing financial returns from the lease of its excess capacity. In fact, those financial returns can and do provide substantial resources to the ITFS licensee in the performance of its

¹³ *Report and Order*, Gen. Docket No. 80-112, 94 FCC 2d 1203 (1983).

educational mission. ... [W]e believe that current ITFS licensees are striving to fulfill that mission and that they should be permitted to obtain the maximum return from their licensed spectrum to further that mission.¹⁴

Second, leasing ITFS spectrum is fully consistent with the Commission's policy goals in its "secondary markets" proceeding. In its *Policy Statement* on principles for promoting the efficient use of spectrum by encouraging the development of secondary markets,¹⁵ the Commission reiterated its belief that an effective way to make unused spectrum held by existing licensees available to others is through secondary markets. The Commission clearly understood that a secondary market can be operated by permitting leasing of spectrum as well as spectrum sales, and it stated its intent to consider a range of options for allowing third parties to operate and control leased facilities.¹⁶ The *Policy Statement* was issued concurrently with the *Notice of Proposed Rule Making* in WT Docket No. 00-230¹⁷ which proposed a variety of rule changes to enhance secondary markets, the first and foremost of which was to promote the wider use of "spectrum leasing" throughout the wireless services. In the case of ITFS, CTN and NIA believe that leasing can accomplish the Commission's goals, without commercial ownership of ITFS spectrum.

Given the Commission's explicit goal to develop secondary markets in wireless services through leasing, and the Commission's consistent recognition of the value of leasing to the development of educational services on ITFS, the suggestion in the NPRM

¹⁴ *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket 97-217, 15 FCC Rcd 14566, 14569 (¶¶ 9-10) (2000).

¹⁵ *Policy Statement*, FCC 00-401 (released December 1, 2000).

¹⁶ *Id.* at ¶ 29.

¹⁷ *Notice of Proposed Rule Making* in WT Docket No. 00-230, 15 FCC Rcd 24203 (2000).

that ITFS should be commercialized because up to 95% of ITFS capacity can be leased is troubling.¹⁸ The existing 5% minimum educational capacity reserve in ITFS leasing was not requested by the ITFS community or, for that matter, by most of the MDS and commercial operator community, but was adopted by the *Commission* in the Two-Way Report and Order because it sought to “maximize the flexibility of educators and wireless cable operators to design systems which best meet their varied needs ... while at the same time safeguarding the primary educational purpose of the ITFS spectrum allocation.”¹⁹

In addition, the Commission needs to recall that the 5% figure is only a baseline. Some licensees, of course, do not lease *any* capacity on their ITFS stations.²⁰ Many ITFS licensees that have entered leasing arrangements can, and do, reserve greater amounts of spectrum for their own use depending on their specific needs.²¹ Because of the flexibility of the current 5% rule, and the fact that licensees do exercise their right to retain greater capacity where appropriate, CTN and NIA do not advocate changing the 5% minimum reservation requirement. Not only would such a change reduce the flexibility enjoyed by

¹⁸ NPRM at ¶ 116.

¹⁹ *Report and Order* in MM Docket No. 97-217, 13 FCC Rcd 19112 (1988), at 19159 (“Two-Way Report and Order”).

²⁰ For example, on the ITFS station facilities of the largest single ITFS user in the United States, South Carolina Educational Television Commission, which has over 65 ITFS stations providing multiple channels of local and state-wide video programming into virtually all schools in the state, no excess capacity use is taking place. It has one lease arrangement with a subsidiary of Sprint covering three stations in the Greenville market, but no actual commercial use has ever been implemented there. Similarly, the University of Maine System, which has nearly 30 ITFS stations providing service throughout the state, has never leased any capacity to a commercial party.

²¹ The vast majority of existing ITFS lease agreements cover analog video operations, and contemplate that the ITFS licensee will use nearly 12% of the channels’ capacity (80 hours per week out of 672 hours available on 4 channels), and has the right to recapture an additional 12% of the capacity for educational use. Many leases, recognizing that the total use/recapture rights add up to nearly one full-time channel out of four channels in the group, simply allocate one channel to educational use – 25% of the group capacity. Other leases are more restrictive. For example, the Diocese of Brooklyn, which uses its ITFS channels to educate 70,000 children and young adults who attend Catholic schools in Brooklyn and Queens, only leases 57% of its ITFS capacity during the school year.

licensees, many leases have been entered into based on the standard approved by the FCC in the *Two-Way Report and Order*, and changing that standard would require these arrangements to be re-negotiated, often to the detriment of the ITFS licensee, who would be expected to make concessions in exchange for the right to reserve the additional capacity it determined it did not need in the first place.

Furthermore, new technologies and digitization have made leasing more feasible and enabled new services. In a broadband or mobile environment, an ITFS licensee may wish to lease a significant portion of its spectrum to a commercial operator, and piggy-back its educational use on that system, rather than attempting to operate a stand-alone system. This is because in a cellularized broadband environment, greater spectrum efficiencies may be achieved if a single entity can take full advantage of new rules that permit channels to be subdivided or combined. The Commission itself has acknowledged these efficiencies:

Of course, the creation of superchannels will typically involve the participation of multiple licensees, each of whom will contribute some portion of the combined spectrum. These voluntary spectrum-sharing arrangements will clearly benefit all of the parties, in that it will give all of them the means to communicate at the data rates optimal for their particular operations and at speeds greater than would currently be permissible within a single 6 MHz channel. We believe this flexibility to subdivide and combine channels is essential in order to take maximum advantage of [the new two-way rules] ...²²

Moreover, 5% of the capacity of 24 MHz of spectrum, put to good use in a highly cellularized environment, will create significant capacity for an educator's own two-way data use. Thus, leasing the maximum amount of channel capacity permitted by the

²² *Two-Way Report and Order*, 13 FCC Rcd 19112, 19120 (¶ 20).

Commission's rules may result in the spectrum being put to its highest and best use through the creation of shared networks.

Finally, the Commission's comparisons of ITFS to DBS service are inapposite. In the so-called DBS 4% educational set-aside, there is no true educational control and, to the knowledge of CTN and NIA, no truly effective educational service. Because there is no dearth of potential educational and informational programmers (which may include any number of Public TV stations, educational institutions and nonprofit and noncommercial entities), DBS operators have the power to select among competing programmers for those that will be permitted to use the set-aside capacity.²³ Naturally, the motivation of the DBS operator is to select programmers that provide services with the widest possible appeal to potential audiences; that is, to use the set-aside as simply one other part of its programming service to be marketed to a mass audience. As a consequence, in reality, there is no programming by local educators oriented to meet actual, local educational needs.

IV. THE AVAILABILITY OF OTHER SOURCES OF PROGRAMMING DOES NOT JUSTIFY CHANGING ITFS ELIGIBILITY RESTRICTIONS.

In the NPRM, the Commission points to the development of alternative means of providing educational content to students as a possible reason to relax ITFS eligibility restrictions. Specifically, at paragraph 112, the Commission asks (1) what does ITFS enable educators to achieve that the Internet could not? (2) what role does educational broadcasting in other bands play? (3) is commercial programming able to fulfill some of these needs?

²³ See Section 25.701(c)(3) of the Rules.

The primary benefit of ITFS over other means of program delivery is that ITFS enables educators to decide for *themselves* how to use spectrum to meet their changing needs. ITFS has traditionally been used for one-way video program delivery to reduce unit cost of education, and thus to enable scarce educational services to reach a wider audience. However, in the years ahead, ITFS will be used increasingly not only for video program delivery, but also as a wireless pipeline for high-speed Internet access, on-demand audio, video and data services, and a host of other applications.

ITFS systems allow educators to “marry” multiple technologies into a single wide area delivery system. For example, the Internet is well-suited for individualized one-on-one instruction. However, a disadvantage of the Internet is the high per-student cost resulting from the need for individual computer terminals, broadband connectivity, etc. Similarly, one-way broadcast video delivery is a well suited for low-cost program delivery over a wide area. However, a disadvantage of broadcast technology is that it is not well suited for individualized or interactive instruction. By using ITFS spectrum as a wireless delivery pipeline, educators can combine multiple services and technologies into one system (*e.g.*, by using ITFS for video program delivery to receive sites, cable headends, and for the delivery of high-speed Internet access) thereby reducing educational costs and meeting individualized educational needs. Again, ITFS systems that are owned, managed, and controlled by schools themselves empower educators to use this wireless pipeline in ways that best meet their students’ changing needs.

Licensee control is becoming increasingly important because the traditional model of learning in the “classroom” is changing. Increasingly, educators need to take the “classroom” to the student. Teachers need access to professional development

materials at home to improve their skills. Adults seeking advanced degrees need access to online degree programs in cases where they are unable to attend on-site classes due to work or family obligations. Employees that want to upgrade their skills must be able to obtain high-quality training online.²⁴ The use of ITFS spectrum will change over time. However, it is the *control* over the asset that empowers educators to decide how the spectrum can best be used to meet their needs.

V. THE COMMISSION'S EXISTING ITFS LEASING RULES PROVIDE SIGNIFICANT FLEXIBILITY TO ALLOW COMMERCIAL LESSEES TO DEPLOY A WIDE VARIETY OF ADVANCED SERVICES IN THE 2.5 GHZ BAND.

At paragraph 115, the Commission states that existing ITFS contractual relationships “may discourage investment and impair the ability of service providers to modify their operations in response to changing technology and market conditions.” The Commission states that “innovation could proceed more smoothly if commercial operators were able to aggregate spectrum in the 2500-2690 MHz band and purchase ITFS stations, which would allow them to exercise direct ownership control.”

As discussed above, there are persuasive public policy reasons why commercial operators should not be permitted to buy ITFS spectrum. Moreover, as is evidenced by the significant number of leasing transactions that have occurred over the past several years, the Commission's leasing rules do *not* discourage investment in ITFS spectrum. Existing lease agreements are structured to provide significant flexibility to commercial lessees to build and modify commercial systems as they see fit. For example, a typical

²⁴ The NEA has made the development of systems to support a decentralized approach to education a top priority, noting the importance of “the development of a user-friendly infrastructure which can accommodate a decentralized approach to program and product development so that the interaction among educators, students, researchers, and those outside of the educational community can occur.” National Education Association Resolutions 1997-1998, <http://www.nea.org/cet/briefs/brief10.html>.

ITFS lease entered into within the past few years, allows the commercial operator to take advantage of virtually all technological and business opportunities in the marketplace, as long as the educational services are protected. Such leases permit commercial operators to require channel shifting or swapping, change channelization to create sub-channels or superchannels, mandate interference consents, introduce new transmission sites and technologies, and provide new service offerings at their discretion. Indeed, except for the fact that educational services have to be protected, and the fact that leases do, at some point, expire, the typical lease offers virtually as much of technological and business flexibility as ownership. In addition, to protect operators at the end of the lease term, most agreements provide the operator a right of first refusal to lease thereafter.

In the final analysis, the problems associated with launching two-way data operations in the band have not been caused by the Commission's leasing requirements. They are due to deficiencies in the existing band plan and technical rules. If the rules are changed as proposed by the Coalition, the existing leasing rules will unleash the full potential of the spectrum for commercial and educational purposes. Ultimately, this will result in increased spectrum efficiency and translate into new and improved services to consumers and businesses, as well as students and educators.

VI. OTHER ITFS ELIGIBILITY AND SERVICE ISSUES.

The Commission asks, in paragraph 116, whether data services meet the ITFS programming requirement. In this regard, the Commission believes that there is a public interest benefit in promoting data services "particularly given that they do not consume as much spectrum as video and may be more useful than a minimal amount of video programming." As reflected throughout these comments, there is in fact no doubt that data services can and should meet ITFS educational use requirements, and that data

services are likely to be of increasing importance to education. The real issue is why this question is being asked at all at this time, given that the Commission clearly already answered it in the affirmative in the *Two-Way Report and Order*. Specifically, in that proceeding, the Commission “sought comment on whether data transmission and voice transmission should count toward the fulfillment of minimum programming requirements....”²⁵ The Commission concluded:

We believe the availability of advanced technologies dictates that it is now time to accord ITFS licensees with increased flexibility in determining which transmissions qualify as satisfying ITFS educational usage requirements, so long as such transmissions are in furtherance of the educational mission of an accredited public or private school, college or university, or other eligible institution, offering courses to enrolled students. Such uses may include downstream or upstream video, data and voice transmissions.²⁶

Finally, the FCC proposes in paragraph 118 of the NPRM to relieve ITFS operators of the burden of filing every channel lease agreement with the Commission, with the proviso that licensees retain copies in their files and make them available to the Commission upon request. CTN and NIA support this proposal. As the Commission suggests, the review of ITFS leases, and the interpretation of the applicable substantive standards, has been inconsistent over the years. At this point, CTN and NIA do not believe that ITFS licensees need paternalistic oversight of their leasing activities, and the Commission certainly does not need the burden of doing so.

²⁵ *Two-Way Report and Order*, 13 FCC Rcd at 19152 (¶ 78).

²⁶ *Id.*, at 19154 (¶ 81). To the extent that there are remnants of the old “video” educational requirements still lurking in the present ITFS rules, the Coalition believes that their continued presence reflects no intention on the part of the Commission to require video for educational purposes, but a failure to fully edit the video references from the rules at the time of the *Two-Way Report and Order*.

VII. CONCLUSION.

The public interest continues to be served by the Commission's current eligibility, educational use and excess capacity leasing rules. The rules should be left unchanged. The policy of requiring the filing and review of excess capacity leases is unnecessary, and should be eliminated.

CATHOLIC TELEVISION NETWORK

NATIONAL ITFS ASSOCIATION

By: /s/ Edwin N. Lavergne

By: /s/ Todd D. Gray

Fish & Richardson P.C.
1425 K Street, N.W.
Suite 1100
Washington, D.C. 20005
202-626-6359

Dow Lohnes & Albertson, pllc
1200 New Hampshire Ave., N.W.
Suite 800
Washington, DC 20036-6802
(202) 776-2571

September 8, 2003

CERTIFICATE OF SERVICE

I, Nadine Curtis, hereby certify that copies of the foregoing Joint Comments of the Catholic Television Network and the National ITFS Association have been served by Hand or by First Class Mail this 8th day of September, 2003, on the following:

Bryan Tramont
Office of Chairman Michael K. Powell
Federal Communications Commission
445 12th St., SW
Room 8-B201
Washington, D.C. 20554

Paul Margie
Office of Commissioner Copps
Federal Communications Commission
445 12th St., SW
Room 8A-302
Washington, D.C. 20554

Barry Ohlson
Office of Commissioner Adelstein
Federal Communications Commission
445 12th St., SW
Room 8-C302
Washington, D.C. 20554

D'wana Terry, Division Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-C321
Washington, D.C. 20554

John Schauble
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-C336
Washington, D.C. 20554

Jennifer Manner
Office of Commissioner Abernathy
Federal Communications Commission
445 12th St., SW
Room 8-B115
Washington, D.C. 20554

Samuel Feder
Office of Commissioner Martin
Federal Communications Commission
445 12th St., SW
Room 8-A204
Washington, D.C. 20554

John Muleta, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C252
Washington, D.C. 20554

Shellie Blakeney
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C300
Washington, D.C. 20554

Gary Michaels
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-A760
Washington, D.C. 20554

Andrea Kelly
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 4-A760
Washington, D.C. 20554

Nancy Zaczek
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C124
Washington, D.C. 20554

Charles Oliver
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C124
Washington, D.C. 20554

Stephen Zak
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th St., SW
Room 3-C124
Washington, D.C. 20554

/s/ Nadine Curtis
